

# TAX LEGISLATION

STANDARDS, TRENDS  
AND CHALLENGES

Edited by  
Włodzimierz Nykiel  
Małgorzata Sęk

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# Table of Contents

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**Preface** /9

## **PART ONE**

**IDENTIFYING STANDARDS, TRENDS AND CHALLENGES  
OF TAX LEGISLATION** / 11

**Theoretical Perspective** / 13

*Bogumił Brzeziński*

Improving Tax Legislation: Some Theoretical Issues / 15

**EU and International Perspective** / 39

*Frans Vanistendael*

Structural Challenges for EU Tax Law / 41

*Adam Zalasinski*

The Basic Principles Governing EU Approximation  
of Double Taxation Conventions / 63

*Jan J.P. de Goede*

What is Going on with Tax Treaties? Standards,  
Trends and Challenges / 72

**National Perspective** / 89

*Jörg Manfred Mössner*

Tax Legislation in Germany – Procedures, Actors, Results,  
Critics / 91

*Daniel Deak*

Legislating Non-orthodox Taxes / 98

*Peter Essers*

How to Improve the Legislative Tax Law Process  
in the Netherlands / 120

*Cezary Kosikowski*

Issues Regarding Tax Legislation in Poland / 131

*Mariusz Popławski*

Current Law-Making Problems at the Municipality-Level  
in the Field of Tax Law in Poland / 144

*Marina Karaseva (Sentsova)*

Modern Trends and Challenges in Russian Tax Legislation / 155

*Natalia Soloveva*

Decisions of the Highest Courts: Influence on the Development  
of Tax Legislation in the Russian Federation / 170

*Philip Baker*

The UK Tax Law Rewrite: 1995 to 2010 / 180

## **PART TWO**

### **DEPICTING NATIONAL TAX LEGISLATION / 189**

*Włodzimierz Nykiel, Małgorzata Sęk*

Standards, Trends and Challenges of National Tax Legislation / 191

*Nikolaus Neubauer*

Depicting National Tax Legislation: Austria / 208

*Yang, Guang Ping*

Depicting National Tax Legislation: China / 229

*Anapaula Trindade Marinho*

Depicting National Tax Legislation: France / 249

*Steffen Lampert*

Depicting National Tax Legislation: Germany / 265

*Gabriella Erdos*

Depicting National Tax: Hungary / 284

*Antonio Uricchio*

Depicting National Tax Legislation: Italy / 299

*Aiste Medeliene*

Depicting National Tax Legislation: Lithuania / 308

*Krzysztof Lasiński-Sulecki, Wojciech Morawski, Jowita Pustul*

Depicting National Tax Legislation: Poland / 333

*Radu Bufan, Mirela Violeta Buliga*

Depicting National Tax Legislation: Romania / 355

*Gordana Ilić-Popov, Svetislav V. Kostić*

Depicting National Tax Legislation: Serbia / 369

*Pedro M. Herrera*

Depicting National Tax Legislation: Spain / 386

*Cecile Brokelind, Tonie Persson* / 397

Depicting National Tax Legislation: Sweden / 397

*Selçuk Özgenç*

Depicting National Tax Legislation: Turkey / 411

*David Salter*

Depicting National Tax Legislation: The United Kingdom / 429

*Stafford Smiley*

Depicting National Tax Legislation: The USA / 457

**The Centre of Tax Documentation and Studies in Łódź  
and the Foundation Centre of Tax Documentation  
and Studies / 473**





# Preface

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This book is the result of the international conference *Tax Legislation: Legal Standards, Trends, Challenges* organized in October 2013 to celebrate the 15<sup>th</sup> anniversary of the Centre of Tax Documentation and Studies of the University of Łódź (Poland). The conference was co-organized by the Centre, the Foundation Centre of Tax Documentation and Studies and Marshal's Office of the Łódźkie Region, in cooperation with the International Bureau of Fiscal Documentation (IBFD) in Amsterdam, the Polish Branch of International Fiscal Association (IFA) and the Polish National Chamber of Tax Advisers.

The conference was held under the honorary patronage of the Marshal of the *Sejm* and under the patronage of the President of the National Bank of Poland, the Marshal of the Łódźkie Region and the Łódź Special Economic Zone.

The idea behind the conference and the book is to identify standards, trends and challenges in drafting, enacting and assessing tax legislation and to create a picture of the tax legislation in force in different countries. The contemporary legal research is focused mainly on the existing tax law and its application rather than on the legislative activities and their results (i.e. legislative instruments). Meanwhile, it is the course of the legislative process that directly influences the functioning of the tax system. The quality of tax legislation affects the entirety of tax relations: from the position of taxpayers and their attitude towards taxation to the efficacy of tax administration and the scale of tax litigation. The novelty of this book lies in its focus on the purely legal aspects of the tax law-making process and the evaluation of the resulting legislation against diverse, but rather formal than substantive, quality criteria. Identifying standards and contemporary challenges of tax legislation is a necessary step in a quest for creating better tax legislation, more suited to the needs of taxpayers and tax administra-

tion in the modern economy. We hope that this book will contribute to the dissemination of knowledge on good practices and contemporary standards in tax law-making.

We would like to express our gratitude to all authors who contributed to the book, as well as all speakers and attendees who redounded to the success of the conference. The conference could not have been organized without the financial support of the partners (EY, Łódź Special Economic Zone), sponsors (City of Łódź Office, TPA Horwath, Wiedza i Praktyka, Wolters Kluwer) and donors (NAU Broker Ubezpieczeniowy Sp. z o.o., Ryszard Wasiak i dr Kristof Zorde). We are grateful for their generous involvement.

Finally, we thank Wolters Kluwer for publishing the book.

*Prof. Dr Włodzimierz Nykiel<sup>1</sup>  
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## Part One

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# **Identifying Standards, Trends and Challenges of Tax Legislation**



# Theoretical Perspective

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## Improving Tax Legislation: Some Theoretical Issues

### 1. General remarks

If we assume, somewhat simplifying matters, that the legal issues of taxation are focused on two areas, i.e. on law-making and the application of the law, it will be clear for an observer that contemporary legal discourse revolves mainly around the second area.

This applies to the theoretical research on law, in particular regarding the issue of the interpretation of tax law<sup>2</sup> and application activities in the strict sense. By contrast, problems of the process of making tax law and of the results of this process, i.e. statutes and other formal sources of law, are less frequently discussed.

The reason for this is quite obvious. Frequent changes in the tax law make it difficult to get a broader perspective, covering not only application of the law but extending to the process of tax law creation and its current form.

Above all, the practical importance of the judicial decisions of the Court of Justice of the European Union (CJEU) is so significant that the analysis and prediction of judgments that define further directions of development of judicial thought seem to sap the intellectual energy

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<sup>1</sup> Prof. Bogumił Brzeziński. Professor of Law, Head of the Public Finance Law Department, Faculty of Law and Administration, Nicolaus Copernicus University, Toruń, Poland; Professor of Tax Law, Financial Law Department, Jagiellonian University, Kraków, Poland.

<sup>2</sup> J. Danzer, *Die Steuerumgehung*, Dr Peter Deubner Verlag GmbH. E., Köln 1981; G. Garcia, *La interpretación de las normas tributarias*, Aranzadi, Pamplona 1997; J. Guez, *L'interprétation en Droit Fiscal*, LGDJ 2007; G. Melis, *L'interpretazione nel diritto tributario*, CEDAM, Padova 2003; B. Brzeziński, *Wykładnia prawa podatkowe*, ODDK, Gdańsk 2011.

of the academic and professional bodies involved in tax issues. There is a great need for this kind of analysis. This means in turn that the issue of the formal aspects of tax law, of its creation and its quality, is the subject of common complaints rather than of more extensive research.

This does not mean of course that the problems pertaining to making tax law, and to the form and quality of it, are not the subject of serious scientific research at all. Frequently, however, the research is devoted to the modelling of a specific legal institution, for example tax rulings<sup>3</sup>, the general anti-avoidance rule<sup>4</sup> and so on. The widest range of issues related to the analysis of models of legal institutions can be found in the studies by V. Thuronyi<sup>5</sup> or those edited by him<sup>6</sup>. However, although valuable, these studies have not resolved problems relating to the strictly legislative aspects of tax. Exceptions include monographs devoted to particular categories of tax legislation, such as a tax law statute<sup>7</sup>.

It seems that the recent analysis of this problem, i.e. concerning tax law as a set of sources of law – statutes and regulations – requires focus on at least three issues that will be considered below. These issues are as follows: the question of a concept of tax law as it is (the structural element of the legal system), the question of the procedure of creating tax law in a proper way and the question of assessing the current state of tax law from the point of view of the standards of proper legislation.

## **2. The concept of tax law as a part of the legal system**

### **2.1. Tax law and its place in the legal system**

Tax law is one of the components of national legal systems. Today it can be said that the process of establishing its basis has ended. This

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<sup>3</sup> C. Romano, *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System?*, IBFD, Amsterdam 2002; H. Filipczyk, *Indywidualne interpretacje prawa podatkowego – prawo i praktyka*, Oficyna Prawa Polskiego, Warszawa 2011.

<sup>4</sup> A. Olesińska, *Klauzula ogólna przeciwko unikaniu opodatkowania*, TNOiK, Toruń 2013.

<sup>5</sup> V. Thuronyi, *Comparative Tax Law*, Kluwer Law International, The Hague 2003.

<sup>6</sup> V. Thuronyi (ed.), *Tax Law Design and Drafting*, Kluwer Law International, The Hague 2000.

<sup>7</sup> C. Kosikowski, *Ustawa podatkowa*, LexisNexis, Warszawa 2006.



means that the tax law is widely recognized as an independent field of law and one of the basic elements of a national legal system.

This view refers particularly to such circumstances as the existence of substantial differences in the core principles and philosophy of tax law in comparison to other areas of financial law, creating sources of tax law and shaping them as a separate subsystem of country laws, isolating and crystallizing the general tax law and its own procedures for dealing with tax matters, creating special tax legal constructions, setting a terminology tradition, the functioning of national and international organizations and associations conducting studies on tax law, etc.

The belief in the separateness and independence of tax law gives rise to a variety of consequences that are sometimes difficult to identify at first glance. Two of them are worthy of note.

First, the autonomy and relative independence of the tax law calls for a law-making tendency to build the sources of tax law in a manner characteristic for areas that already have such features. This reinforces the trend of tax law codification (leading to creating a general tax law statute or even a tax code) and the tendency to regulate comprehensively issues related to taxes in the core tax law (to create separate tax procedures, i.e. separate from other administrative procedures, to eliminate tax material from statutes devoted primarily to non-tax material and so on). Therefore, we can talk about the phenomenon of the 'maturation' of tax law, i.e. of its achieving independence.

Second, the widespread recognition of tax law as a distinct area of the system of law is relevant to the legal interpretation, since it creates a requirement to seek solutions to the emerging problems of interpretation primarily on the basis of the tax law, and not other, even functionally close, areas of law.

None of this entails breaking ties with other areas of law, particularly private law. Private law gives form to economic phenomena to which tax law applies. Many private law concepts, such as those of a limited liability company, a contract of sale or of inheritance, are understood in tax law in the same way as they are in private law. In tax law one can also meet direct references to private law, which necessitates making use of the latter in determining the rights and obligations arising under the former.

The separation and relative independence of tax law raises the issue of how to employ for the purposes of tax law legislation the forms of legal texts known in the legal culture. While a statutory form of law

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■ The idea behind the conference and the book is to identify standards, trends and challenges in drafting, enacting and assessing tax legislation and to create a picture of the tax legislation in force in different countries.

■ The contemporary legal research is focused mainly on the existing tax law and its application rather than on the legislative activities and their results (i.e. legislative instruments). Meanwhile, it is the course of the legislative process that directly influences the functioning of the tax system. The quality of tax legislation affects the entirety of tax relations: from the position of taxpayers and their attitude towards taxation to the efficacy of tax administration and the scale of tax litigation.

■ The novelty of this book lies in its focus on the purely legal aspects of the tax law-making process and the evaluation of the resulting legislation against diverse, but rather formal than substantive, quality criteria. Identifying standards and contemporary challenges of tax legislation is a necessary step in a quest for creating better tax legislation, more suited to the needs of taxpayers and tax administration in the modern economy.

■ This book gathers information on good practices and contemporary standards in tax law-making, provided by an international team of renowned authors.

■ The publication is addressed to academics, doctoral candidates and students, as well as tax practitioners, including tax lawyers, tax advisors, tax officials and judges. It should be particularly interesting to tax legislators and tax policy makers, or more generally – to all officials involved in drafting and enacting tax legislation.

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